



**THE ATTORNEY GENERAL
OF TEXAS**

GERALD C. MANN

~~JOHN BEN SULLIVAN~~
ATTORNEY GENERAL

AUSTIN 11, TEXAS

February 6, 1939

Mr. D. W. Porter
Chief Engineer
Department of Agriculture
Austin, Texas

Opinion No. O-156

Re: What Constitutes a Navigable
State Owned Stream in Texas.

Dear Mr. Porter:

This acknowledges receipt of and is in reply to your letter of January 16, 1939, in which you request an opinion on the extent of open waters on the Guadalupe River in Kerr County, and an opinion as to what the minimum length of such areas must be in order for the same to constitute a State owned stream.

In your letter you state that the cut banks of the stream in question are from 50 to 100 feet apart and that there are a number of areas in the stream containing holes of water 50 to 100 feet in width and from one-fourth to one mile in length, but that in many portions of the stream the holes of water are only 10 to 15 feet wide and in some instances narrow enough to step across.

By Statute, Article 5302, R.C.S., the State of Texas defines a navigable stream as follows:

"All streams so far as they retain an average width of 30 feet, from the mouth up, shall be considered navigable streams within the meaning hereof."

In writing this opinion we assume that the average width of the bed of the stream in question, from the mouth up, is at least 30 feet. The term "Bed of a Stream" has been defined by the Texas courts as follows:

The bed of a stream is that portion of its soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean state during an entire year, without reference to the extra freshets of the winter or spring of the extreme drouths of the summer or autumn."

Motl v. Boyd, 286 S.W. 458.

If the bed of the stream to which you refer retains an average width from the mouth up of at least 30 feet, then such stream is a navigable stream, and the title thereto is owned by the State of Texas whether or not such stream is navigable in fact and whether or not the flow of waters in such stream in ordinary seasons is less than 30 feet. State vs. Bradford, 56 S.W. (2) 1065.

The fact that the stream in question does not have a continuous current of water is immaterial, provided, however, that the stream be such that rain, springs, or other sources of water supply will, at recurring intervals, produce a flow of water, and provided that such conditions recur with some degree of regularity so that they establish and maintain a running stream for considerable periods of time, though such periods are intermittent and brief. Hoefs vs. Short, 273 S.W. 785.

It has been held, with respect to the North Fork of the Red River in Texas, that such stream is a navigable, state owned stream, notwithstanding the fact that there is no permanent flowing water on the surface of the bed of such stream, and although such stream had no springs or sources of water other than rain fall, such rain fall coming but occasionally, and although the water in such stream ran in a current for only one to ten hours after every substantial rain, and no more frequently than four or five times a year, the water thereafter standing in holes from 10 to 20 days, where it is also shown that the distance from cut bank to cut bank, from the mouth up, was at least 30 feet. State vs. Bradford, 56 S.W. (2) 1065; Heard vs. Town of Refugio, 103 S.W. (2) 728.

In the light of the statute and decisions quoted from above we answer your inquiry as follows:

If the Guadalupe River in Kerr County retains an average width from cut bank to cut bank, from the mouth up, of at least 30 feet, and if such river has a permanent but not necessarily continuous source of water supply, which water when flowing is retained in a well defined channel, then such river, insofar as it retains such characteristics, is a navigable, state owned stream.

You, of course, will understand that before we can render you a definite, unconditional opinion upon whether or not the Guadalupe River in Kerr County is or is not a navigable, state owned stream, it will be necessary for you to furnish us with specific facts and figures with reference to the average width of the bed of such stream,

Mr. D. W. Porter, February 6, 1939, Page 3, O-156

the frequency with which it contains flowing waters, the source of its water supply, the condition of its channel, and such other data which is relevant to the determination of the character of the area in question. If this opinion is not sufficient for your purposes we shall be glad to amplify it upon receiving from you the specific facts and figures referred to.

Yours very truly

ATTORNEY GENERAL OF TEXAS

s/ Robert E. Kepke

By

Robert E. Kepke
Assistant

REK:LM-cg
APPROVED:

S/ Gerald C. Mann

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